BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of	)	
	)	
PUBLIC UTILITIES COMMISSION	)	DOCKET NO. 2008-0273
	)	
Instituting a Proceeding to Investigate the Implementation of Feed-in Tariffs	)	
	)	

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PUBLIC UTILITIES COMMISSION

RESPONSES OF
ZERO EMISSIONS LEASING LLC
TO THRESHOLD LEGAL QUESTIONS
IN APPENDIX C TO THE NRRI SCOPING PAPER

AND

CERTIFICATE OF SERVICE

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RESPONSES OF ZERO EMISSIONS LEASING LLC TO THRESHOLD LEGAL QUESTIONS IN APPENDIX C TO THE NRRI SCOPING PAPER

ZERO EMISSIONS LEASING LLC ("Zero Emissions") respectfully submits the following answers and information responsive to the threshold legal questions contained in Appendix C: Questions to the National Regulatory Research Institute (NRRI) scoping paper titled *Feed-in Tariffs: Best Design Focusing Hawaii's Investigation* (the "Scoping Paper").

Threshold Issues (Legal)

1. If the price associated with a feed-in tariff exceeds the utility's avoided cost, then by definition the utility's customers will incur higher costs than they would in the absence of the feed-in tariff. Please comment on the legal implications of this result.

   Response: The request for comment assumes that the utility's customers will incur higher costs than they would in the absence of the feed-in tariff if the feed-in tariff price exceeds the utility's avoided cost. The utility's customers may not incur higher costs if the distributed generation (DG) economic benefits to utility customers of renewable generation under a feed-in tariff -- including capital savings, reduced risk and enhanced reliability -- equal or exceed the amount by which the feed-in tariff exceeds the utility's avoided cost.

   For example:

   a) Is this result permissible under current Hawaii statutes?

   Response: The assumed result is permissible because current Hawaii statutes do not forbid utilities from causing their customers to incur higher costs for the electricity that customers purchase from utilities. The *method* for achieving the assumed result – utility payment to producers of a feed-in tariff price that exceeds the utility's avoided cost – is impermissible under HRS § 269-27.2.

   b) Does HRS § 269-27.2 create a ceiling on the feed-in tariff price?

   Response: Yes. Under HRS § 269-27.2, if the utility purchases "nonfossil fuel generated electricity" from a producer under a feed-in tariff, the feed-in tariff price "shall not be more than one hundred percent of the cost avoided by the utility ..."

   c) If so, how do the signatories to the Energy Agreement (or other parties to this proceeding) propose to demonstrate that each feed-in tariff price does not violate the statute?

   Response: Zero Emissions does not propose to demonstrate that each feed-in tariff price does not violate HRS § 269-27.2. It may not be possible to demonstrate that any feed-in tariff price will not violate HRS § 269-27.2 because the avoided cost rate under HRS § 269-27.2 depends primarily on the utilities' fossil fuel costs that change over time. Any feed-in tariff price may violate HRS § 269-27.2 unless the feed-in tariff price is limited to the avoided cost rate under HRS § 269-27.2, or unless HRS § 269-27.2 is amended so that the avoided cost rate does not limit the feed-in tariff price.

2. As with any administrative agency decision, a Commission decision approving a feed-in tariff must be supported with substantial evidence.

a) Focusing on the price term, what evidence is legally necessary?

Response: Substantial evidence justifying "the implementation of feed-in tariffs in the HECO Companies' service territories," per the Order Initiating Investigation, filed October 24, 2008 in this docket, is legally necessary. Substantial and legally necessary evidence justifying the implementation of such feed-in tariffs would include evidence showing the amounts (in MW) of renewable energy generation called forth by feed-in tariffs enacted in jurisdictions other than Hawaii.

Consider these options, among others:

i) evidence of actual costs to develop similar projects in Hawaii

Response: Evidence of actual costs to develop renewable energy projects in Hawaii, similar to renewable energy projects developed elsewhere, or similar to renewable energy projects to be developed in Hawaii under a feed-in tariff, could be considered legally necessary.

ii) generic (i.e., non-Hawaii) evidence of costs associated with each particular technology

Response: Non-Hawaii evidence of costs associated with each particular technology could be considered legally necessary.

iii) evidence that the tariff price results in costs equal to or below the utility's avoided cost

Response: Evidence that the feed-in tariff price results in costs equal to or below the utility's avoided cost would not be legally necessary because the utility's avoided cost changes over time and there is no way of determining whether any feed-in tariff price for any technology would result in costs equal to or below the utility's avoided cost at any time in the future.

b) By what process do the signatories (and other parties to this proceeding) propose to gather this evidence and present it the Commission, under the procedural schedule proposed by the signatories?

Response: Zero Emissions proposes to gather this evidence and present it to the Commission in accordance with the processes specified in the procedural schedule as approved by the Commission.

3. Assume the Commission does create feed-in tariffs, which entitle the seller to sell to the utility at the tariff price.

a) If the tariff price exceeds the utility's avoided cost, is there a violation of PURPA, provided the seller is relying on a state law right to sell rather than a PURPA right to sell?

Response: No. PURPA establishes an avoided cost floor price at which a utility is obliged to purchase renewably generated electricity. A state may enact a feed-in tariff obliging the utility to purchase renewably generated electricity at a feed-in tariff rate that exceeds the avoided cost floor price under PURPA.

b) If the tariff price exceeds the utility's avoided cost (as calculated prior to the existence of the tariff), could a seller assert a PURPA right to a sale at the tariff price, on the grounds that the utility now has a new "avoided cost" equal to cost it would have incurred under the state-mandated feed-in tariff?

Response: A seller, or the utility, might assert such a right based on the legal precedents used to justify the Commission's adoption of the Competitive Bidding Framework.

c) If the price associated with a feed-in tariff is less than the utility's avoided cost, what benefit does the tariff offer the developer that is not already available under PURPA?

Response: The feed-in tariff rate offers the developer certainty that the utility will take the electricity and certainty of what price the developer will receive for that electricity. When these are combined with the projected output from the project, the result is a highly certain revenue stream for the project developer. This reduces the financial risks and, therefore, the cost of capital for project development, and speeds project development.

d) Please offer any other comments concerning the legal and practical relationship between the feed-in tariff and existing PURPA rights and obligations.

Response: Implementation of a feed-in tariff would not be limited by existing rights and obligations under PURPA.

Other Threshold Issues

4. Feed-in tariffs, if approved by the Commission, would join an array of legislative and regulatory initiatives to boost production of renewables in Hawaii. Those initiatives include PURPA, the renewable portfolio standard, net metering and various distributed generation actions. Are there overlaps, redundancies, gaps among these multiple initiatives?

Response: Yes.

What is the independent purpose of each of these, in relation to the others?

Response: Feed-in tariffs, as enacted in countries like Germany, are ratepayer-funded incentives for the development of renewable energy generation by independent producers who deliver the energy to the utility for distribution to the utility's customers (utility-distributed RE generation).

Hawaii's renewable portfolio standard (RPS) – establishing quotas for the amount of renewable energy delivered to utility customers, and a fixed penalty ($20/MWh) for utility failure to meet those quotas -- could be a ratepayer-funded incentive for the development of utility-distributed RE generation if the utility were to pay cash to an independent producer for a renewable energy certificate (REC) that allows the utility to avoid the fixed penalty. RECs currently have virtually no value to independent producers in Hawaii because the utility can compel the producer to surrender RECs for no value as part of the price negotiation for power purchase contracts negotiated under the Competitive Bidding Framework.

Net energy metering (NEM) would be a ratepayer-funded incentive for the development of renewable energy self-generation. When the distributed generation benefits to the utility and ratepayers are fairly valued, NEM does not cost ratepayers anything and is not, therefore, truly "ratepayer-funded".

"De-linked" rates (including Schedule Q rates), subject to an avoided cost ceiling price under HRS §269-27.2, are ratepayer-funded incentives for the development of utility-distributed RE generation that falls within the exemptions from the Competitive Bidding Framework (generally < 5 MW on Oahu, < 2.7 MW on Maui and Hawaii). De-linked rates are *de facto* being negotiated within the Competitive Bidding Framework because the Commission has not established a methodology for determining de-linked rates.

Photovoltaic rebates, authorized by SB 988 (SLH 2008), would be ratepayer-funded incentives for the development of photovoltaic self-generation.

Renewable energy technology income tax credits are taxpayer-funded incentives for the development of photovoltaic and small wind self-generation.

* * * *

DATED: Honolulu, Hawaii, January 12, 2009

Erik Kvam
Chief Executive Officer
Zero Emissions Leasing LLC

CERTIFICATE OF SERVICE

I hereby certify that I have this date filed and served the original and eight copies of the foregoing **RESPONSES OF ZERO EMISSIONS LEASING LLC TO THRESHOLD LEGAL QUESTIONS IN APPENDIX C TO THE NRRI SCOPING PAPER** in Docket No. 2008-0273, by hand delivery to the Commission at the following address:

CARLITO CALIBOSO
PUBLIC UTILITIES COMMISSION
465 S. King Street, Suite 103
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I hereby further certify that I have this date served two copies upon the first of the following parties, and one copy upon each of the remainder of the following parties, of the foregoing **RESPONSES OF ZERO EMISSIONS LEASING LLC TO THRESHOLD LEGAL QUESTIONS IN APPENDIX C TO THE NRRI SCOPING PAPER** in Docket No. 2008-0273, by causing such copies or copy thereof to be mailed, postage prepaid, and properly addressed to each such party as follows:

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